21645-B

NO. ~~21654-B~~

United States
Court of Appeals
for the Ninth Circuit

MICHAEL PASTERCHIK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Oregon was based on 18 U.S.C.A. 3231. The indictment charged offenses against the laws of the United States, 15 U.S.C.A. § 902 (e) and (g). This Court has jurisdiction by virtue of 28 U.S. C.A. 1291.

STATUTES AND RULES INVOLVED

15 U.S.C.A. § 902. Transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce; acts prohibited

> "(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."
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> * * *
>
> "(g) It shall be unlawful for any person to transport or ship or cause to be transported or shipped in interstate or foreign commerce any stolen firearm or ammunition, knowing, or having reasonable cause to believe, same to have been stolen."

18 U.S.C.A. Chapter 213 — Limitations § 3282. Offenses not capital

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

18 U.S.C.A. Federal Rules of Criminal Procedure Rule 48. Dismissal

> "(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

COUNTER-STATEMENT OF THE CASE

While awaiting trial for a Dyer Act violation (CR 66-137, 21645-A), the appellant was indicted by the Federal Grand Jury for the interstate transportation of a firearm by a felon and the interstate transportation of a stolen firearm on October 7, 1966 (R[1] 1, Tr. 40). After waiving a jury (R. 5), the appellant was found guilty of both counts of the indictment by the Honorable John F. Kilkenny, District Judge, on December 13, 1966 (Tr. 95, 100). On the same day, the appellant was sentenced to three years imprisonment on each count, to run concurrently with each other, and consecutively to the five year sentence imposed on the appellant's Dyer Act conviction (R. 14, Tr. 103).

While staying for a few days during April, 1966, at Donner's Trail Ranch in Verdi, Nevada, the appellant became friendly with Anthony Marcewicz (Tr. 45, 50). Marcewicz owned a 22 caliber "Junior Colt" pistol, which he had purchased at the Verdi Gun Shop in Verdi, Nevada (Tr. 43, 46, and 55; Government Ex. No. 25-D).

One day after their newly acquired friendship, the appellant asked to borrow Marcewicz's pistol (Tr. 47). Appellant stated he was going on a walk with three women, including Marcewicz's mother, and wanted to

[1] As used hereafter, Tr. denotes the transcript of the proceedings below; A.Br. the appellant's brief; R. the record on appeal.

do some shooting (Tr. 51). Marcewicz loaned the gun to the appellant on the condition that it be returned after the walk; he did not intend to sell or give it permanently to the appellant (Tr. 47, 52).

The appellant was gone the next day (Tr. 52, 53). Marcewicz did not see his gun or appellant until he identified both at appellant's trial (Tr. 46, 47; Government Ex. No. 25). The permanent taking was without Marcewicz's permission (Tr. 47).

The appellant met Iris Dorsey Fortney during early May, 1966, in Portland, Oregon, and shortly thereafter moved into her house in Lake Oswego, Oregon (Tr. 57, 63). Two days after they had met, Mrs. Fortney saw the appellant take out an object resembling a pistol from the jockey box of his car (Tr. 57, 62).

On either the 5th or 6th of June, the appellant told Mrs. Fortney (Tr. 58, 63): "Watch that (appellant's shaving kit). It is loaded." Upon looking into appellant's shaving kit, Mrs. Fortney found a pistol, which she later testified was the same as Government Ex. No. 25 (Tr. 59).

At approximately 3:00 PM on June 6th, Mrs. Fortney saw two strange men, who she assumed to be law enforcement officers, talking to the appellant (Tr. 60, 68). They later turned out to be FBI agents who had arrested the appellant (Tr. 14).

Mrs. Fortney feared possible gun play and hid the gun (Tr. 60, 68). She later gave the gun to Phillip Atteberry, who in turn gave it to Special Agent Max Taylor of the FBI (Tr. 61, 74, and 78). Both men testified that this gun was the same as Government Ex. No. 25 (Tr. 78, 85).

ARGUMENT

I

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDINGS THAT THE APPELLANT KNOWINGLY TRANSPORTED A STOLEN FIREARM IN INTERSTATE COMMERCE, AS CHARGED IN COUNT II OF THE INDICTMENT.

Appellant asserts there is insufficient evidence to support his convictions. In judging the sufficiency of the evidence, all conflicts are to be resolved against the defendant-appellant, and the evidence, including all reasonable inferences therefrom, must be viewed by this court in a light most favorable to the governfent. *Glasser v. United States,* 315 *U.S.* 60, 80 (1942); *Byrnes v. United States,* 327 F.2d 825, 830 (C.A. 9, 1964). Thus the appellant's contention that he should have "the benefit of the doubt" on appeal (A.Br. 9) is without merit.

An examination of the record reveals that the testimony of the government's witnesses was clearly sufficient to warrant the trial court in finding that the appellant had knowingly transported a stolen firearm

in interstate commerce. The appellant had asked to use Marcewicz's pistol while in Nevada. Marcewicz loaned it to the appellant on the express condition that it be returned after its use. The appellant disappeared the next day and the gun was never returned. This taking was without Marcewicz's permission. The same gun was next seen in the appellant's shaving kit in Lake Oswego, Oregon, two months later.

From these facts and any reasonable inferences therefrom, it was proper for the court to determine that the gun had been stolen and that it had been transported across state lines. *Ziegler v. United States,* 254 F.Supp. 199, 202 (D.C. Montana, 1966) and *United States v. Thompson,* 261 F2d 809, 812 (C.A. 2, 1958). The government's evidence here was circumstantial; but it was uncontradicted and positive as to the guilt of the appellant.

This court does not weigh the evidence or test the credibility of the witnesses. *Glasser v. United States,* supra at 80. A trial judge's decision on a matter of fact, which is supported by evidence which he deems credible, should not be set aside by an appellate court even though that court might come to an opposite conclusion from a reading of the record. *United States v. Ziemer,* 291 F.2d 100, 102 (C.A. 7, 1961).

Absent an abuse of discretion, and none here is charged or revealed by the record, this court will ac-

cept the results reached by the district court, trying the case without a jury, insofar as a determination of the fact is concerned. *United States v. Jones,* 302 F.2d 46, 47 (C.A. 7, 1962). In this case, there is substantial evidence to support the findings of the trial court. *Joseph v. Donover Company,* 261 F.2d 812, 817 (C.A. 9, 1959).

II

THIS COURT NEED NOT CONSIDER APPELLANT'S CONTENTIONS OF ERROR CONCERNING COUNT I OF THE INDICTMENT.

The propositions for which appellant relies upon *Gravatt v. United States,* 260 F.2d 498 (C.A. 10, 1958) and *Matula v. United States,* 327 F.2d 337 (C. A. 10, 1964) (A.Br. 11) carry great merit. Nevertheless, the appellant's conviction on Count I of the indictment must be affirmed. The sentence under Count I runs concurrently with that imposed under Count II (Tr. 103). The major legal question raised on this appeal is the sufficiency of the evidence to prove the two crimes charged. This court has held in numerous cases that where there is sufficient evidence to support one count, as in Count II here, the convictions on the other counts must also be affirmed, in view of the concurrent sentences imposed. *Byrnes v. United States,* 327 F.2d 825, 830 (C.A. 9, 1964); *Stein v. United States,* 337 F.2d 14, 17 (C.A. 9, 1964); *Mendez v. United States,* 349 F.2d 650, 652 (C.A. 9, 1965); *Cervantes v.*

United States, 347 F.2d 206, 207 (C.A. 9, 1965).

Therefore, this court need not consider the appellant's contentions regarding Count I, no matter how much merit they may have.

III

THE APPELLANT WAS NOT PREJUDICED IN ANY WAY BY THE RETURN OF THE INDICTMENT ON OCTOBER 7, 1966.

The appellant was arrested by F.B.I. agents for unlawful flight to avoid prosecution in Lake Oswego, Oregon, at approximately 3:00 P.M. on June 6, 1966, and was arraigned on that charge later in the afternoon (Tr. 17, 18, and 21, for CR. 66-137, No. 21645-A consolidated on appeal). On June 13, 1966, the appellant was indicted for the interstate transportation of a stolen vehicle (R. 1 for CR. 66-137, No. 21645-A, Tr. 40). On June 22, the appellant was arraigned on the Dyer Act charge and trial was set for the week of October 10th (R. 9, No. 21645-A). While awaiting trial on the Dyer Act charge, the appellant was indicted for interstate transportation of a stolen firearm and the interstate transportation of a firearm by a felon on October 7, 1966 (R. 1 for 21645-B). The appellant was tried on December 13, 1966. The appellant was held in custody continuously since his initial delivery to the United States Marshal in early June (Tr. 40).

A criminal defendant's right to a speedy trial guaranteed by the Sixth Amendment and implemented by Rule 48 (b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., does not arise until after a prosecution is instituted against the accused. *D'Aquino v. United States,* 192 F.2d 338, 349-350 (C.A. 9, 1951); *Venus v. United States,* 287 F.2d 304, 307 (C.A. 9, 1960). Any delay occuring between the commission of the offense and the commencement of the prosecution is controlled exclusively by the applicable statute of limitations. *Nickens v. United States* and cases cited therein, 323 F.2d 808, 809 (C.A.D.C., 1963).

No claim is advanced by the appellant that he was arrested, detained, or held in custody for the offenses charged in the two counts of the present indictment, prior to the return of that indictment. In fact, the appellant was in custody awaiting trial on a completely separate Dyer Act offense (Tr. 40). The appellant's argument seems to be that he should have been indicted sooner for the firearm offenses. There is no merit to this contention, for the right to a speedy trial contemplates a pending charge and not the mere possibility of a criminal charge. *Parker v. United States,* 252 F.2d 680, 681 (C.A. 6, 1958), cert. den. 356 U.S. 964.

Since the indictment was returned within the allowable statutory period, 18 U.S.C.A., § 3282, the *only*

delay which the appellant can complain of is the lapse of time between the return of the indictment and the trial. *Harlow v. United States,* 301 F.2d 361, 366 (C.A. 5, 1962). The indictment was returned on October 7, 1966, and the appellant was tried and found guilty as charged on December 13, 1966. By no stretch of the imagination can this period of time be called an unreasonable delay or even a delay at all. The standards of prejudice, oppression, and wilfull procrastination are not met here. *Pollard v. United States,* 352 U.S. 354, 361 (1956). Furthermore, even if there were an unreasonable delay between the two above-mentioned occurrences, the appellant would be in no position to complain, since he never demanded an earlier trial. *United States v. Ettelt,* 334 F.2d 813, 815 (C.A. 7, 1964).

The District Court's ruling on this matter is in the record below (Tr. 40) and is now part of the record on appeal (A.Br. 11). The District Court, without a trace of unreasonableness or arbitrariness, used its sound discretion in denying appellant's motion to dismiss the indictment. *Nickens v. United States,* supra at 811.

IV

THE COURT'S ORDER DENYING APPELLANT'S MOTION TO SUPPRESS THE FIREARM SHOULD BE AFFIRMED.

The appellant is asking this court to reverse the

lower court's order denying his motion to suppress the firearm (A.Br. 12). As the appellant did not specifically assign this as error in his argument, the government will rely upon the facts and conclusions of law stated in that order (R.11).

CONCLUSION

It is respectfully submitted that:

1. The order denying appellant's motion to supress the firearm should be affirmed, for the reasons stated in that order (R. 11).

2. The order denying the appellant's motion to dismiss the indictment should be affirmed.

3. The appellant's convictions on both counts of the indictment should be affirmed.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Date: 14th day of September, 1967.

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